APPEAL NO. 010328

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 11, 2001. The hearing officer determined that the appellant (claimant) reached maximum medical improvement (MMI) on April 6, 2000, with a 4% impairment rating (IR) as assessed by the designated doctor, whose opinion was not contrary to the great weight of other medical evidence.

The claimant appealed, citing other medical reports with higher IRs and arguing that the designated doctor's report was improper because the doctor had not retested for invalid range of motion (ROM). The respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

The claimant was injured in a compensable motor vehicle accident on _____, and initially saw his family doctor, who diagnosed a "cervical strain" and "musculostrain." The claimant subsequently began treating with Dr. B on October 11, 1999. Dr. B ordered cervical and lumbar diagnostic testing, which was normal (except that it confirmed a lumbar fusion at L4-5 and L5-S1 that the claimant had from a prior 1990 accident). After not seeing the claimant for several months, Dr. B, in an evaluation dated April 6, 2000, certified MMI on that date with a 24% IR, which was calculated entirely based on loss of ROM as follows: 8% impairment for cervical loss of ROM, 2% impairment for thoracic loss of ROM, and 15% impairment for lumbar loss of ROM, combined to arrive at the 24% IR.

Dr. H was appointed as the designated doctor and in a Report of Medical Evaluation (TWCC-69) and narrative, both dated May 8, 2000, Dr. H certified MMI on April 6, 2000 (the same date as Dr. B), with a 4% IR. Dr. H diagnosed the injury as a "post cervical strain with continued subjective complaints without corresponding objective findings." Dr. H assessed a 4% impairment from Table 49 Section (II) (B) of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). Dr. H commented that no impairment was given for ROM "as it is not felt that a reliable [ROM] has been provided." In regard to the lumbar spine, Dr. H noted the previous fusion and commented that "[u]sing Table 49, Section II, it is felt that no additional impairment has resulted in [claimant's] lumbar spine due to the [compensable injury] . . . [and] no impairment is given for loss of motion."

The claimant was subsequently seen by Dr. S, who, in a report dated July 3, 2000, opined that the claimant was not at MMI. The claimant was also examined by Dr. V, who certified that the claimant was at MMI on August 15, 2000, and assessed a 9% IR due to a soft tissue injury to the claimant's lower back, which was given a 5% impairment, and stated that "[f]or ROM he has a 4% [IR]." Dr. V gave 0% ratings for sensory loss and loss of strength. Dr. V apparently rated the claimant at 5% for a specific disorder for the lumbar

spine from Table 49, Section (II) (B) of the AMA Guides and 4% for loss of lumbar ROM. Dr. V reevaluated the claimant and, in a narrative report of December 4, 2000, commented that while Dr. H had invalidated ROM he "never scheduled a follow up visit" which should have been done according to page 72 of the AMA Guides. Dr. V amended his prior report by saying that the claimant "suffered a 10 percent impairment to his lower back" without stating exactly how that was calculated (apparently the ROM loss was increased).

The hearing officer, in a letter dated December 28, 2000, wrote Dr. H asking about cervical and lumbar ROM and whether additional ROM testing should be conducted, referring to page 72 of the AMA Guides. Dr. H replied by letter dated January 3, 2001, stating:

> [Claimant] had a normal MRI scan that was done of his cervical spine. He also had a myelogram, post myelogram CT that showed no additional changes other than the post operative changes from his injury in 1990. [Claimant] was felt not [to] have participated fully in the range of motion studies of his cervical spine. In regards to his lumbar spine, a valid [ROM] study was not obtained.
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> In my opinion he was not felt to have participated fully in the [ROM] of his cervical spine and the fact that he had a normal MRI of his cervical spine were the reasons that he was not felt to have suffered any impairment secondary to loss of motion of his cervical spine. No impairment was given for his lumbar spine as a valid [ROM] study was not obtained.
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> I would be more than happy to repeat his cervical spine and lumbar spine [ROM] studies . . . . However, in my opinion, I do not believe that would be appropriate.

The Appeals Panel stated in Texas Workers' Compensation Commission Appeal No. 941299, decided November 9, 1994, that the language in the AMA Guides on the number of retests is "permissive" and that "the actual number of ROM tests undertaken is properly left to the professional judgment of the doctor provided that at least one attempt at validation after an invalid test is made." However, we have also recognized that such retesting is a matter of medical judgment and have affirmed where the designated doctor indicated why a retest was not indicated. *See, e.g.,* Texas Workers' Compensation Commission Appeal No. 970264, decided March 31, 1997, and Texas Workers' Compensation Commission Appeal No. 981384, decided August 10, 1998. *See also* Texas Workers' Compensation Commission Appeal No. 992169, decided November 18, 1999 (Unpublished). In this case, the hearing officer asked the designated doctor about retesting and Dr. H replied that while he did not think retesting "would be appropriate" he would be happy to repeat cervical and lumbar spine ROM studies. Apparently, the hearing officer determined that there was a clinical basis for the designated doctor's reply and that retesting was not necessary.

We are satisfied that the hearing officer did not err in according presumptive weight to the designated doctor's report and that the hearing officer's determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge